LIBRARY
SUPREME COURT, U. S

FILED
MAR 21 1975
MICHAEL RODAK, JR., CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-1219

MODERN ASPHALT PAVING AND CONSTRUCTION CO.,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
for the Seventh Circuit

RALPH D. WALKER
EDWARD G. MAAG
4343 West Main Street
Belleville, Illinois 62223
Counsel for Petitioner

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

TABLE OF CONTENTS

Page

The Opinion Below 1

Jurisdiction 2

Question Presented 2

Statutes Involved 3

Statement of the Case 4

Reasons for Granting the Writ 9

Conclusion 19

Appendix

A. A-1

B. A-14

C. A-20

Cases Cited

Elizabeth Hospital, Inc. v. Richardson, 8th Cir., 269 F2d 167, cert. denied, 361 U.S. 884 (1959) 14

Ford Wholesale Co. v. Fibreboard Paper Products Corp., 9th Cir., 493 F2d 1204 15

Gough v. Rossmoor Cor., 9th Cir., 487 F2d 373, 373 (1973) 14

Gulf Oil Corp. v. Copp Paving Co., ... U.S. ..., 42 L. Ed. 2d 378, 386, 95 S.Ct. 11, 14

In re Western Liquid Asphalt Cases, 9th Cir., 487 F2d 202 (1973) 14

Lieberthal v. North County Lanes, Inc., 2nd Cir., 332 F2d 269 (1964) 14

Mandeville Island Farms, Inv. v. American Crystal Sugar Co., 334 U.S. 219, 234, 238-239 (1948) 11

Maple Flooring Manufacturers' Assn., et al. v. United States, 268 US 563, 579 (1925), 69 L.Ed. 1100 18

Page v. Work, 290 F2d 323, 331, 332 (9th Cir., 1961)..11, 14

Rosemound Sand & Gravel Co. v. Lambert Sand & Gravel Co., 5th Cir. 469 F2d 416 (1972) 14

Saint Anthony-Minneapolis, Inc. v. Red Owl Stores, Inc., 316 F.Supp. 1045 (D.Minn. 1970) 14

Sun Valley Disposal Co. v. Silver State Disposal Co., 9th Cir., 420 F2d 341 (1969) 14

United States v. Bensinger Co., 8th Cir., 430 F2d 584, 588 (1970) 10, 11, 12, 14

United States v. Employing Plasterers Association, 347 U.S. 186, 188 (1954) 11

United States v. McKesson & Robbins, Inc., 351 U.S. 305, 309-310 (1956) 10

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. .....

MODERN ASPHALT PAVING AND CONSTRUCTION CO.,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Seventh Circuit

Modern Asphalt Paving and Construction Co., a corporation, petitioner, prays that a writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in this case on January 29, 1975.

OPINION BELOW

The opinion of the United States Court of Appeals is not yet reported, but is set forth in full as Appendix "A" to this petition on Pages A-1 through A-13. The opinion of the Court of Appeals affirmed the convictions of Modern Asphalt Paving and Construction Co. and a co-defendant corporation for an

alleged violation of Section 1 of the Sherman Act (15 USCA Sec. 1). The petitioner and co-defendant had been tried by jury in the United States District Court for the Eastern District of Illinois, the Honorable James L. Foreman, Judge presiding, and the jury found both defendants guilty. The Court denied all defendants' post-trial motions, imposed monetary fines upon both defendants and entered judgment of conviction on the jury's verdict.

JURISDICTION

The judgment of the United States Court of Appeals was entered on January 29, 1975. A Petition for Rehearing was filed on February 12, 1975 and denied by the United States Court of Appeals on February 25, 1975. Jurisdiction of this Court is invoked under 28 USC, Section 1254(1).

QUESTION PRESENTED

Did the court below err in affirming the District Court's judgment of conviction of petitioner by holding that the jurisdictional and substantive requirement of Section 1 of the Sherman Act (15 USCA Sec. 1) of a "restraint of interstate commerce" by the prohibited activity was met by evidence that goods (representing less than 10% of the entire cost of a wholly intrastate local city sewer project) were purchased in interstate commerce and employed in the local construction project and some federal funds for the project came from the United States Department of Housing and Urban Development (HUD), a federal agency, in the absence of any proof of any restraining effect upon either the price or intent to affect the price of the flow of the incidentally employed interstate commodities.

STATUTES INVOLVED

The statute involved is the Sherman Antitrust Act, 15 USC, Sec. 1, et seq. The relevant provisions of 15 USCA, Sec. 1 are quoted in full as follows:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided*, That nothing contained in sections 1 to 7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further*, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on

conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

STATEMENT OF THE CASE

This action arose by the return of an indictment by the Grand Jury for the United States District Court for the Eastern District of Illinois which contained a single count charging Finis P. Ernest, Inc. (Ernest) and Modern Asphalt Paving and Construction Co. (Modern) with a violation of the Sherman Act, 15 USCA, Section 1, for a combination and conspiracy to submit collusive and non-competitive, rigged bids to the City of East St. Louis, Illinois for a local city sanitary sewer project.

The case was tried to a jury, the Honorable James L. Foreman, Judge presiding, and the jury found both defendants guilty. The trial court denied all of the defendants' post-trial motions and imposed fines of $35,000.00 and costs on Ernest and $15,000.00 and costs on Modern.

The petitioner, Modern, raised three issues on the appeal to the United States Court of Appeals for the Seventh Circuit:

1. Whether there was sufficient evidence to prove the jurisdictional and substantive requirements of a restraint of interstate commerce imposed by Section 1 of the Sherman Act (15 USC Sec. 1);
2. Whether the evidence was sufficient to prove a conspiracy between the defendants to rig bids; and
3. Whether the court erred in admitting evidence showing that Modern had insufficient funds in its checking account to cover the check which it submitted to the City with its bid.

The petitioner on this appeal in this petition prays certiorari solely upon the issue of whether there was sufficient evidence to prove the federal constitutional jurisdictional requirement as well as the substantive statutory requirement of Section 1 of the Sherman Act (15 USCA, Sec. 1) that an actual *restraint* on interstate commerce must be shown to establish jurisdiction under Section 1 of the Sherman Act.

Petitioner's co-defendant, Ernest, has not joined in this petition for a writ of certiorari although Ernest did, independently, appeal its conviction to the United States Court of Appeals for the Seventh Circuit.

The facts shown by the evidence insofar as they relate to the jurisdictional and substantive issue of whether or not the evidence reflected the statutory and constitutional requisite "restraint on interstate commerce" are as follows:

Ernest and Modern were the only two bidders on a local sanitary sewer project involving a few city blocks in the City of East St. Louis, Illinois which was financed, in whole or in part, by federal funds under a grant from the United States Department of Housing and Urban Development (HUD), a federal agency, in connection with a local East St. Louis urban renewal scheme.

The Ernest total bid for the project was $260,180.78. The total bid price of Modern for the same job was $262,204.65.

The alleged conspiracy involved a wholly intrastate sewer project in the City of East St. Louis, Illinois; involved only local workmen; and involved two local East St. Louis contractors (defendants Ernest and Modern), neither of whom was engaged in the production and sale of goods and services in interstate commerce. The defendants each were local contractors in the City of East St. Louis on a local sewer project and were engaged in activities solely intrastate in nature. The defendant, Ernest, was awarded the contract on his low bid. The

Government introduced evidence that materials used by Ernest in construction of these local sanitary sewers were manufactured outside the State of Illinois. Clay sewer pipe manufactured in Indiana and manhole frames and covers manufactured in Wisconsin were purchased by Ernest after the job had been awarded from Sidener Supply Company of Granite City, Illinois who sold the goods to Ernest out of stock on hand in their warehouse in Illinois. A sewer pumping station was purchased by Ernest after the award of the job from Davco Manufacturing Company in Georgia. The total cost of all items from outside the State of Illinois which were employed in the $260,180.78 project was approximately $9307.00. This represented less than 10% of the total contract price. Larry E. Sidener, the owner of Sidener Supply Company, who sold to Ernest out of his stock on hand clay pipe and manhole covers and frames, testified that prior to any bidding on this project he purchased these manhole covers and frames outside the State of Illinois and had maintained them in his warehouse stock in Granite City, Illinois for sale to Illinois customers. The Government witness, Daniel Beck of Davco Manufacturing Company, and the witness Sidener of Sidener Supply Company testified that the price they charged for the pumping station and the clay pipe and manhole covers and frames to Ernest was precisely the same price that would have been charged to any prospective customer who sought to purchase these commodities at the time. There was no evidence at all of any effect upon the price charged for the interstate goods which represented the minor fraction (less than 10%) of the $260,180.78 cost of the project and there was no evidence whatever of any agreement by Davco, Sidener, the defendants or anyone else to affect or control or restrain the prices or deliveries of any commodities in interstate commerce.

The project was built under a contract with the City of East St. Louis, Illinois with funds which had been supplied by the United States Department of Housing and Urban De-

velopment (HUD). In February of 1971 (seven months prior to the time the alleged collusive bids were submitted in August of 1971), the United States Department of Housing and Urban Development (HUD) approved $300,000.00 for public improvements, primarily sewer construction. The foregoing facts are the only facts in the case which relate or pertain in any way to the proof of the jurisdictional prerequisite of a "restraint on interstate commerce."

The issue of a lack of jurisdiction in the Federal Court and a complete failure of the evidence to show a violation of the Sherman Act by reason of the lack of any evidence to prove the requisite restraint on interstate commerce was raised by the petitioner in all stages of this proceeding. In the District Court the issue was raised in Motions for Judgment of Acquittal filed at the close of the Government's evidence and at the close of all the evidence as well as in petitioner's Motion in Arrest of Judgment, for Judgment of Acquittal and for a New Trial.

This same issue was presented to the United States Court of Appeals for the Seventh Circuit by the petitioner and this most crucial issue of the necessary "restraint on interstate commerce" was given priority treatment by the Court of Appeals in its eleven and one-half page opinion which devoted approximately nine pages thereof to a discussion of the unique and heretofore unresolved issue here presented.

The opinion of the United States Court of Appeals for the Seventh Circuit affirmed the conviction of the petitioner and held that the evidence hereinabove referred to was sufficient to satisfy the jurisdictional and substantive requirements of the Sherman Act relating to a restraint on interstate commerce.

In so holding, the Court of Appeals for the Seventh Circuit pointed out that this Court, the Supreme Court of the United States, "has never decided the question of whether a business

with out of state activities which engages in a local conspiracy to restrain commerce falls within the jurisdiction of the Sherman Act EVEN THOUGH THERE IS NO RESTRAINING EFFECT UPON INTERSTATE COMMERCE."

In addition, the Court of Appeals held for the first time in any case under the Sherman Act, that the presence of federal money in a project, however local in nature, is sufficient to establish a restraint on interstate commerce within the meaning of the Sherman Act.

REASONS FOR GRANTING THE WRIT

The petitioner, Modern Asphalt Paving and Construction Co., respectfully and most earnestly and sincerely urges that there exist in this cause not less than three manifestly, overwhelming and compelling reasons for the granting of a writ of certiorari in this cause. Those reasons are as follows:

1. This Court has never decided the question of whether a local business which only incidentally utilizes interstate goods in its business falls within the jurisdiction of the Sherman Act by engaging in a wholly local conspiracy to restrain intrastate commerce even though there is no restraining effect on interstate commerce.

2. There presently exists a division among several circuits and even conflicts within the same circuits in deciding the issue presented under No. 1 hereof.

3. Neither this Court nor any subordinate Court of Appeals or any District Court of the United States has ever held, as was done by the lower court here, that the fact that a grant of federal funds to finance, in whole or in part, a wholly local intrastate project is sufficient to satisfy the necessary jurisdictional and substantive prerequisite of the Sherman Act (15 USCA Sec. 1) of a "restraint of trade or commerce among the several states or with foreign nations."

I

This Court Has Never Decided the Question of Whether a Local Business Which Only Incidentally Utilizes Interstate Goods in Its Business Falls Within the Jurisdiction of the Sherman Act by Engaging in a Wholly Local Conspiracy to Restrain Intrastate Commerce Even Though There Is No Restraining Effect on Interstate Commerce.

The United States Court of Appeals for the Seventh Circuit in its opinion reviewed the entire evidentiary record in this cause and found that conspiracy existed between the petitioner, Modern Asphalt Paving and Construction Co., and its co-defendant, Finis P. Ernest, Inc., to submit collusive, non-competitive and rigged bids on a local sanitary sewer project in East St. Louis, Illinois. The award of the contract was made to Ernest on his low bid of $260,180.78. The Court of Appeals found that of this total cost of the project, substantially less than 10%, to-wit: $9,307.00, represented goods which had been manufactured outside the State of Illinois. The Court of Appeals found that the price of these interstate goods was not affected by the alleged bid rigging since the evidence showed that the sellers of these interstate goods charged the standard prices for the items sold. Despite the absence of any evidence in the cause of a restraint upon the flow of interstate goods or the price to be charged therefor; and despite direct and uncontradicted proof of the absence of any effect on the prices for these interstate items by the alleged bid rigging, the Court of Appeals hypothesized a theoretical restraint on interstate commerce by a misapplication of the doctrine that price fixing constitutes a *per se* restraint under the decision of this Court in *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305, 309-310 (1956) and *United States v. Bensinger Co.*, 8 Cir., 430 F2d 584, 588 (1970).

In so doing, the opinion of the Court of Appeals for the Seventh Circuit in this case failed to recognize that Section 1 of

the Sherman Act (15 USCA, Sec. 1) prohibits conspiracies "in restraint" of interstate commerce. The statutory language and the cases which have interpreted it clearly reflect that the "restraint" may be either of the following two categories:

> A. If the object of the conspiracy directly affects the price of goods in the flow of commerce, it is said to be a per se violation and there need be no qualitative test as to whether the amount of the restraint was substantial and adversely affects interstate commerce. *Gulf Oil Corp. v. Copp Paving Co.*, ... U.S. ..., 42 L.Ed. 2d 378, 386, 95 S.Ct. ...; *Page v. Work*, 290 F2d 323, 331, 332, 9th Cir. (1961); *United States v. Bensinger*, 430 F2d 584, 589, 8th Cir. (1970).
>
> B. Where the price fixing is at a purely local level or intrastate level, as in the case at bar, the assumed conspiracy does not as a matter of law affect interstate commerce. With respect to a local or intrastate activity which incidentally employs some goods which had been transported in interstate commerce, the conspiracy must be shown by the evidence to have substantially and adversely affected the flow of interstate commerce. *Gulf Oil Corp. v. Copp Paving Co.*, ... U.S. ..., 42 L.Ed. 2d 378, 386, 95 S.Ct. ...; *Page v. Work*, 290 F.2d 323, 331, 332, 9th Cir. (1961); *United States v. Bensinger*, 430 F2d 584, 589, 8th Cir. (1970); *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 234, 238-239 (1948); *United States v. Employing Plasterers Association*, 347 U.S. 186, 188 (1954).

The Court of Appeals for the Seventh Circuit in the case at bar (and apparently Courts in other Circuits) have mistakenly failed to recognize the distinction made by this Court in its prior decision which delineated the different standards to be applied where the conspiracy directed affected the price of goods in the flow of interstate commerce under "A" above and where the

price fixing is at a purely local or intrastate level and only incidentally employs some goods which had been manufactured in interstate commerce. This distinction, which was overlooked by the Court of Appeals for the Seventh Circuit in this case, did not escape the Court of Appeals for the Eighth Circuit in *United States v. Bensinger*, 430 F.2d 584, 589, 8th Cir. (1970). Nowhere is the fatal defect inherent in the prosecution in this case more pointedly demonstrated than in the opinion of the Eighth Circuit in *Bensinger*.

There, the conspiracy charged involved an agreement between a local St. Louis dealer of kitchen appliances and an appliance manufacturer, the defendant Hobart, in the State of Ohio, to fix the price of a single dishwasher which was to be sold to a local St. Louis Polynesian restaurant. The proof showed that Hobart and its local dealer, Bensinger, entered into a price fixing agreement for the sale of a dishwasher manufactured by Hobart in Ohio which was to be sold through Bensinger to a Polynesian restaurant in St. Louis. Another Hobert dealer, Almar, who desired to bid to supply the Hobart dishwasher was told by Hobart's sales representative that Hobart would not allow Almar to underbid Bensinger for the job. If Almar bid the job, it would not only be in danger of having its Hobart franchise revoked by Hobart; but if it underbid Bensinger and got the job, Hobart would not deliver the dishwasher to Almar.

Despite the fact that the difference in the price to be bid by Almar and Bensinger was less than $400.00, the Court of Appeals, quite correctly, affirmed the conviction of both Bensinger and Hobart. The Court held that the agreement directly threatened both the delivery and the pricing of goods produced in interstate commerce. It was, therefore, a *per se* violation of the Sherman Act and thus it was not necessary to prove a substantial effect on interstate commerce. In so holding, however, the Court of Appeals for the Eighth Circuit sharply delineated

and distinguished their holding in that case from the precise situation which we have in the case at bar. The Court of Appeals said in a footnote to their opinion at Page 589:

> "Since the conspiracy was not intrastate in character the requirement of that theory that the effect on interstate commerce be direct and substantial is not applicable here. . . . If the conspiracy were one involving only Bensinger and Almar, we would have a different case, for then there would be a more difficult question as to whether the conspiracy occurred in the course of interstate commerce; we might then be faced with the question of whether this was an intrastate conspiracy which substantially affected interstate commerce. However, the involvement of Hobart as a conspirator changes the whole complexion of the conspiracy."

In the case at bar, one need only substitute the names of Ernest and Modern for Bensinger and Almar in the above quotation to perceive the fatal defect inherent in the opinion of the Court of Appeals in petitioner's case. In the case at bar, there is not, as the Court of Appeals found, a scintilla of evidence that the alleged conspiracy between Ernest and Modern had the slightest effect upon the prices charged by Davco and Sidener for the minor amount of interstate goods employed in the project.

The Court of Appeals laboriously reviewed decisions of this Court and previous decisions in the Ninth Circuit, the Seventh Circuit, the Fifth Circuit, the Second Circuit, and the Eighth Circuit which were in some respects found to be "inconsistent" and attempted to rationalize these seemingly conflicting opinions and to evaluate the delicate factual nuances inherent in each. In its dilemma, the United States Court of Appeals in its opinion at Page 6 lamented the confusing condition of the present case law and observed at Page 6:

> "The Supreme Court has never decided the question of whether a business with out-of-state activities which engages in a local conspiracy to restrain commerce falls within the jurisdiction of the Sherman Act even though there is no restraining effect on interstate commerce. In deciding related questions, however, the Court has used language which might suggest that an interstate restraint is required for jurisdiction."

We agree with the Court of Appeals for the Seventh Circuit in this cause that this Court has never decided or passed squarely upon the jurisdictional and substantive issue presented by this case. This Court is now presented by this petition with an opportunity to finally and definitively resolve this nagging issue for it is squarely presented in this case and by the grant of certiorari herein, this Court may once and for all resolve the nagging and pernicious dilemma which now exists with respect to Section 1 of the Sherman Act.

II

There Presently Exists a Division Among Several Circuits and Even Apparent Conflicts Within the Same Circuit in Deciding the Issue Presented Under "I" Hereof.

The opinion of the Court of Appeals for the Seventh Circuit in the case at bar points up the problem of interpretation which exists among several circuits as to whether the elements of restraint and interstate commerce may be satisfied separately or whether jurisdiction requires that restraint be upon the interstate commerce.

In the opinion, the prior decisions of the Ninth Circuit in *Gough v. Rossmoor Cor.*, 9 Cir., 487 F2d 373, 376 (1973); *In re Western Liquid Asphalt Cases*, 9th Cir., 487 F2d 202 (1973); *Gulf Oil Corp. v. Copp Paving Co.*, . . . U.S. . . ., 42

L.Ed. 2d 378, 386, 95 S.Ct. . . ., 9th Cir., 487 F2d 202; *Ford Wholesale Co. v. Fibreboard Paper Products Corp.*, 9th Cir., 493 F2d 1204; *Page v. Work*, 9th Cir., 290 F2d 323 (1961); and *Sun Valley Disposal Co. v. Silver State Disposal Co.*, 9th Cir., 420 F2d 341 (1969) were reviewed and found by the Court of Appeals for the Seventh Circuit in this case to be in some respects inconsistent. Moreover, in its opinion in the case at bar, the Court of Appeals found that the Courts in other Circuits, to-wit: the Fifth, the Second and the Eighth, had found jurisdiction under the Sherman Act to be absent where interstate activities *were alleged where there was no showing that the restraint operated on the interstate commerce.* See *Rosemound Sand & Gravel Co. v. Lambert Sand & Gravel Co.*, 5th Cir., 469 F2d 416 (1972); *Lieberthal v. North County Lanes, Inc.*, 2 Circuit, 332 F2d 269 (1964); *Elizabeth Hospital, Inc. v. Richardson*, 8th Cir., 269 F2d 167, cert. denied, 361 U.S. 884 (1959); *Saint Anthony-Minneapolis, Inc. v. Red Owl Stores, Inc.*, 316 F. Supp. 1045 (D.Minn. 1970).

After observing that this Court has never decided the issue, the Court of Appeals found both jurisdiction and a substantive violation of the Sherman Act despite the fact that the evidence showed that the price of the interstate goods in the case at bar was not affected by the alleged bid rigging. The Court of Appeals for the Seventh Circuit in its opinion in this case adopted a view in direct opposition and in contradiction to the rationale of the Ninth Circuit in *Page v. Work*, 290 F2d 323, 331, 332 (9th Cir., 1961); the Fifth Circuit in *Rosemound Sand & Gravel Co. v. Lambert Sand & Gravel Co.*, 469 F2d 416 (1972); the Second Circuit in *Lieberthal v. North County Lanes, Inc.*, 332 F2d 269 (1964); and the Eighth Circuit in *Elizabeth Hospital, Inc. v. Richardson*, 8th Cir., 269 F2d 167, cert. denied, 361 U.S. 884 (1959) and *United States v. Bensinger*, 430 F2d 584, 589 (1970).

The conflict between the circuits on the issue here presented is manifest. The absence of an earlier definitive decision on the

issue here presented by this Court has contributed to the present confusion. This conflict between the circuits and the resultant confusion inherent therein ought to be resolved by the grant of the prayer of this petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit in this cause.

III

Neither This Court, Nor Any Subordinate Court of Appeals or Any District Court of the United States Has Ever Held, as Was Done by the Lower Court Here That the Fact That a Grant of Federal Funds to Finance, in Whole or in Part, a Wholly Intrastate Project Is Sufficient to Satisfy the Necessary Jurisdictional and Substantive Prerequisite of the Sherman Act (15 USCA, Sec. 1) **of a "Restraint of Trade or Commerce Among the Several States or With Foreign Nations".**

The indictment in this cause (Appendix "B") in describing the local sewer construction project contained an allegation that the Federal Government, through the United States Department of Housing and Urban Development (HUD), financed the construction of the local sanitary sewer project in East St. Louis, Illinois by the approval of $300,000.00 in federal funds for this project. There was no allegation that such funds were a part of interstate commerce or that the presence of such funds constituted the necessary jurisdictional and substantive requirements of the Sherman Act (15 USCA, Sec. 1) of a restraint on interstate commerce by reason of the effect of the alleged price fixing agreement. Section 1 of the Sherman Act does not refer in any way, either directly or indirectly, to the presence of federal money as an element in determining the jurisdictional and substantive requirements of the act with regard to a restraint on interstate commerce.

There is no decision of any court prior to the decision of the United States Court of Appeals for the Seventh Circuit in the

instant case which has held or, so far as is known, has even considered this issue. At Page 8 of the opinion of the United States Court of Appeals for the Seventh Circuit, that court held for the first time in the history of jurisprudence that because funds for the local project came from the United States Department of Housing and Urban Development (HUD), a federal agency, that those funds were transferred in interstate commerce and this fact alone was sufficient to supply not only the jurisdictional nexus of interstate commerce itself, but also the substantive requirement of Section 1 of the Sherman Act. The Court of Appeals hypothesized from a record which is completely devoid of any testimony that the United States Department of Housing and Urban Development (HUD) funds were transferred in interstate commerce or the flow of such funds were restrained in any way.

The issue thus presented is not only novel and one of first impression, but also it is one of far reaching implications. Virtually no aspect of human activity in the fifty States of this Union would be beyond the reach of the implications of Section 1 of the Sherman Act if the decision of the United States Court of Appeals for the Seventh Circuit were allowed to stand. Every physician in this country derives a portion of his income through federal money through Medicare; every pharmacist likewise receives money through the same Government Health and Welfare programs; each local groceryman who accepts food stamps would thus be subject to the Sherman Act; every local service station which sells motor fuel on which there is a motor fuel tax imposed would be within the reach of the Act, however isolated, local and whatever the minor nature of his business activities. No political subdivision of State Government, nor even the State itself, from every local volunteer fire department through each school district, township, city, county and state where any quantity of federal funds by way of excise taxes, revenue sharing, housing and urban development program, school aid or Medicare. No human

activity in our society would be beyond the reach of the Sherman Act if the novel and unprecedented hypothesis set forth in the opinion of the United States Court of Appeals for the Seventh Circuit were allowed to stand. To say that this theory is revolutionary and the implications of it unprecedented is conservative indeed. Neither the legislative history of the act itself nor any decision by this or any other Court which has construed it has ever, by even the slightest hint, suggested that Section 1 of the Sherman Act was intended to have such broad or far reaching implications. It is significant that neither the United States Court of Appeals nor the Federal Government in its Brief filed before that Court cited any legislative or judicial authority in support of its position on this issue.

Almost one-half a century ago, this Court in its infinite wisdom and with an abundance of foresight, cautioned the courts of this nation to be wary of progressive and pernicious extensions of jurisdiction invoked under the Sherman Act by carefully and assiduously considering each case upon the particular facts disclosed by the record. In *Maple Flooring Manufacturers' Assn., et al. v. United States*, 268 US 563, 579 (1925), 69 L.Ed. 1100, this court was called upon to consider whether the conduct of the defendant caused direct and undue restraint of competition in interstate commerce. With regard to consideration of that issue, the Court cautioned at Page 579 of 268 US:

> "It should be said at the outset that in considering the application of the rule of decision in these cases to the situation presented by this record, it should be remembered that this court has often announced that each case arising under the Sherman Act must be determined upon the particular facts disclosed by the record, and that the opinions in those cases must be read in the light of their facts and of a clear recognition of the essential differences in the facts of those cases, and in the facts of any new case to which the rule of earlier decisions is to be applied."

CONCLUSION

Certiorari is warranted here. The opinion of the United States Court of Appeals for the Seventh Circuit virtually invites this Court to grant certiorari. Each of the elements which this court has traditionally found to warrant the grant of certiorari is present here:

A. The jurisdictional issue under a law of the United States, to wit: the Sherman Act (15 USCA, Sec. 1) is involved;

B. This court has never decided the issue presented in this cause;

C. There presently exists a division among several circuits and even apparent conflicts within the same circuit concerning the issue; and

D. The holding of the Court of Appeals that the presence of federal funds in a project or activity is sufficient to comply with the jurisdictional and substantive requirements of the Sherman Act is novel, without precedence, either legislative or judicial, and has such far reaching implications that the issue ought to be decided clearly and unequivocally by no less authority than this Court.

The errors of the Court below should not be permitted to stand.

Respectfully submitted

RALPH D. WALKER
EDWARD G. MAAG
WALKER & WILLIAMS
Professional Corporation
4343 West Main Street
Belleville, Illinois 62223
(618) 277-1000
Counsel for Petitioner